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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN PAUL WEAVER,

Appellant-Petitioner,

VS.

STATE OF INDIANA,

Appellee-Respondent.

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No. 77A05-0704-PC-211

APPEAL FROM THE SULLIVAN CIRCUIT COURT

The Honorable P. J. Pierson, Judge

Cause No. 77C01-9701-CF-3

September 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Steven Weaver appeals the post-conviction court's summary denial of his petition for post-conviction relief. Weaver raises three issues, one of which we find dispositive and restate as whether the post-conviction court erred by failing to refer Weaver's petition for post-conviction relief to the State Public Defender. We reverse and remand.

The relevant facts follow. On April 1, 1997, the trial court sentenced Weaver to fourteen years in the Indiana Department of Correction following his guilty plea to aggravated battery as a class B felony. On January 10, 2007, Weaver filed a pro se petition for post-conviction relief. In the petition, Weaver alleged that he was indigent and incarcerated in the Indiana Department of Correction, requested to be represented by the Indiana Public Defender, and requested that his petition be forwarded to the Indiana Public Defender for appointment of counsel. Weaver also attached an affidavit of indigency to his petition. On January 31, 2007, the State filed a response to Weaver's petition and requested summary disposition of the petition pursuant to Ind. Post-Conviction Rule 1(4)(g). On February 6, 2007, the post-conviction court summarily denied Weaver's petition for post-conviction relief. Weaver filed a motion to correct error and alleged, in part, that the post-conviction court erred by summarily denying the petition without referring the petition to the State Public Defender. Weaver's motion to correct error was deemed denied pursuant to Ind. Trial Rule 53.3.

On appeal, Weaver argues, in part, that the post-conviction court erred by failing to refer his petition for post-conviction relief to the State Public Defender's office. Ind. Post-Conviction Rule 1(2) provides:

If an affidavit of indigency is attached to the petition, the clerk shall call this to the attention of the court. . . . If the court finds the indigent petitioner is incarcerated in the Indiana Department of Correction, and has requested representation, it shall order a copy of the petition sent to the Public Defender's office.

Ind. Post-Conviction Rule 1(9)(a) provides that upon receiving the petition, “the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice.” Further, “[t]he Public Defender may refuse representation in any case where the conviction or sentence being challenged has no present penal consequences.” Ind. Post-Conviction Rule 1(9)(a).

Within thirty days after the filing of the petition, or any further reasonable time ordered by the court, the State must file its answer “stating the reasons, if any, why the relief prayed for should not be granted.” Ind. Post-Conviction Rule 1(4)(a). “If the State Public Defender has filed an appearance, the State Public Defender shall have sixty (60) days to respond to the State’s answer to the petition filed pursuant to Rule PC 1(4)(a).” Ind. Post-Conviction Rule 1(4)(f). “If the pleadings conclusively show that petitioner is entitled to no relief, the court may deny the petition without further proceedings.” Id.

Here, Weaver attached an indigency affidavit to his petition, indicated that he was incarcerated in the Indiana Department of Correction, and requested representation by the State Public Defender. However, the record does not indicate that his petition was referred to the State Public Defender. We addressed a similar circumstance in Eller v. State, 757 N.E.2d 141, 142-143 (Ind. Ct. App. 2001), where the trial court failed to refer

an incarcerated petitioner's petition for post-conviction relief to the State Public Defender's office. There, we reversed the summary denial of his petition for post-conviction relief and remanded to the post-conviction court with instructions to forward the petition to the State Public Defender's office. 757 N.E.2d at 144. See also Ferrier v. State, 270 Ind. 279, 281, 385 N.E.2d 422, 423-424 (1979) (holding that the trial court erred by failing to refer the petition for post-conviction relief to the State Public Defender's office).

The State concedes that the proper remedy here, as in Eller, is remand for referral of Weaver's petition for post-conviction relief to the State Public Defender's office. Consequently, we reverse the summary denial of Weaver's petition for post-conviction relief and remand with instructions to forward the petition to the State Public Defender's office. See, e.g., Eller, 757 N.E.2d at 144.

For the foregoing reasons, we reverse the post-conviction court's summary denial of Weaver's petition and remand for further proceedings consistent with this opinion.

Reversed and remanded.

RILEY, J. and FRIEDLANDER, J. concur